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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 93.

BERLIN MILLS COMPANY, *Petitioner,*

vs.

PROCTOR & GAMBLE COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S REJOINDER.

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The brief filed by the Respondent and entitled "Respondent's Rejoinder," was filed and served on Petitioner on Friday, November 12th, in the morning of the day on which it was expected that this case would

be reached for argument. Believing that the Petitioner is entitled to the last word, we request consideration of this brief reply.

Although Respondent in its main and supplemental briefs asserted, contrary to the facts, that the blending of oleo-stearin with cottonseed oil, does not produce in the final semi-solid product a ratio of olein to linolin greater than in cottonseed oil, we understand Respondent now to concede that the addition of oleo-stearin to cottonseed oil does increase the ratio of olein to linolin in the final product.

Respondent asserts, however, that the increase in the ratio of olein to stearin is "negligible." This is not in accordance with the facts, unless Kream Krisp is excluded thereby with the products of the prior art.

Oleo-stearin is added to cottonseed oil in varying proportions, according to the titer or consistency of the oleo-stearin and the titer of the oil. (McCaw, Qs. 17-20, p. 82; Qs. 231-234, p. 180.) (The "titer" is, roughly speaking, the solidifying point of the mixed fatty acids. Rec., pp. 324, 325.) For example, in the manufacture of "Planteen," (a prior art product made long prior to 1909 by McCaw Manufacturing Company) 20% of oleo-stearin was blended with 80% of cottonseed oil (Qs. 17-20, p. 82); whereas, in Jewel 12% to 15% of oleo-stearin was blended with 85% to 88% cottonseed oil. (Q. 27, p. 347.) Oleo-stearin having a titer of about 53 and iodine value of 20, contains no linolin, but consists of approximately 77% stearin and 23% olein. Therefore, when 20 % of oleo-stearin is added to 80% cottonseed oil, the final product consists of a mixture of glycerides, in which the proportion of stearin has been increased, the

ratio of olein to linolin increased, and the proportion of linolin has been decreased, as contrasted with the original cottonseed oil. Thus

	Morrison's Cottonseed Oil	80% of Cottonseed Oil		20% of Oleo-Stearin		Prior Art Planteen
Per cent Stearin	21.8	17.44	+	15.4	=	32.84
Per cent Olein	29.6	23.68	+	4.6	=	28.28
Per cent Linolin	48.6	38.88	+	0.0	=	38.88
	100	80%	+	20%	=	100%

When 12% to 15 % of oleo-stearin is blended with 85% to 88% cottonseed oil, as in making Jewel, there is in the final product, of necessity, (whatever may be the proportions of component glycerides in the cottonseed oil) an increase in the proportion of stearin and an increase in the ~~proportion~~ ratio of olein to linolin, and a decrease in the proportion of linolin, when the product is contrasted with the cottonseed oil. That this is not negligible, is shown by comparing the decrease in the percentage of linolin in Planteen, Jewel and Flake White with the percentage of linolin in cottonseed oil. Whereas, in the various samples of cottonseed oil there is from 46% to 48.6% linolin, in Jewel, Planteen and Flake White there is only 38.88%—42%.

But, even assuming the ratios of olein to linolin given on page 3 of Respondent's Rejoinder, namely, those of Morrison's cottonseed oil, viz., .61, and Flake White .667 (which was made by blending Morrison's cottonseed oil with hard hydrogenized oil), the ratio of olein to linolin has been increased from .61 to .667. The ratio in Planteen is increased from .61 to .74.

In Kream Krisp the ratio of olein to linolin is increased from .706 (Richter's cottonseed oil) to .906.

In the product of the patent in suit the ratio of olein to linolin is increased from .610 (Morrrison's cottonseed oil) to 13.000 to 15.000.

Thus, there is an increase in the ratio of olein to linolin in all the products of the prior art, as well as in Kream Krisp and the product of the patent in suit. Whereas, in the prior art products and in Kream Krisp the increase is anywhere from .067 to .200, the increase in the patented product is from 13.000 to 15.000. Hence, if the increase is "negligible" in the prior art products, as compared with the patented product it is "negligible" in Petitioner's product, Kream Krisp.

The injection by the Respondent of the ratio of olein to linolin, in this case, at the last hour, in an attempt to indicate the patentability of the subject-matter of claims 1 and 2, is, as stated on page 8, *et seq.*, of Petitioner's supplemental brief, a complete reversal of the position deliberately taken by the Respondent before and insistently pressed upon the District Court and the Court of Appeals, and is contrary to all the testimony in the case. In Respondent's Brief before the Court of Appeals, the Respondent in direct opposition to its present contention, set forth *as alleged errors* in the decision of the District Court, the following:

> "11. In holding that the *relative proportions of the glycerides in the product is relevant to claims 1 and 2* or to the infringement thereof, *or to any issue in this case*, in view of the fact that those proportions are only specified in the claims not in issue. (Italics ours.)

"12. In *holding that the statements of the specifications as to glyceride proportions are to be read into claims 1 and 2 in view of the fact that those statements were introduced by amendment as a foundation for the introduction of claims 5, 6 and 7* and that this understanding was expressed by the examiner's letter to that effect (Rec., p. 549) and applicant's reply" (Rec., p. 550). (Brief for Appellant, page 52.) (Italics ours.)

Again, the Respondent asserted, in the same brief, on page 41, that,

"The lardlike constituency (of the patented product) depends upon the *quantitative relation between the solid fat stearin on the one hand and the sum of the two liquid fats linolin and olein on the other.*"

Again,

"The essence of the patent is chemically to raise the melting point of the original oil, so that it would be semi-solid, plastic and lardlike, at normal temperatures. Buchenal was not concerned in this view of the case whether all, or a large part of the linolin was less reduced and the olein less increased and the desired consistency was obtained by increasing the stearin." (Page 98.)

"The essential constituents which made the product lardlike as distinguished from a liquid are *the proportion of added hard materials, not the changed proportions of the liquids*" (olein and linolin). (Italics ours.) (Page 100.)

We submit that the Respondent should not be permitted to play fast and loose, and that the foundation of its argument in this case is, by its own words without merit.

On page 4 of Respondent's Rejoinder the allegation is made that "according to the *proofs* no vegetable compound ever existed in the prior art wherein the relationship between the liquid constituents differed at all from that of cottonseed oil." The proofs do not so show. On the contrary, the Sears patent (Rec., p. 709) discloses a vegetable compound, in which the vegetable fat "containing the oil (olein) as well as stearin" was blended with cottonseed oil. Hard vegetable tallow, which was commercially available, consists of stearin and olein and no linolin. (Lewkowitsch Chem. Tech, Oils, Fats and Waxes, Vol. II, pp. 592-595.) Hence in the Sear's product, the ration of olein to linolin is greatly increased. We have shown also that Flake White was a part of the prior art and that the ratio of olein to linolin therein is also increased.

The assertion is constantly made in Respondent's Rejoinder that the patented product contains no cottonseed oil. The facts are these. In the patented product, in Kream Krisp, and in the products of the prior art, the operator starts with cottonseed oil in every case. When he gets through, the final material or product is not cottonseed oil, but is a semi-solid product. In each case the chemical proportions of the component glycerides are different than those of cottonseed oil. In each case the percentage of stearin and the ratio of olein to linolin are increased and the percentage of linolin is decreased in the final product, so that these percentages are not those of cottonseed oil. (This is shown by the chart opposite page 82 of Petitioner's main brief.)

Therefore, assuming it to be true, for the sake of argument, that the patented product, as finally produced, contains no cottonseed oil because the percent-

ages of its component glycerides differ from those in cottonseed oil, then it is equally true that the prior art products contain no cottonseed oil, because their percentages of component glycerides also differ from those in cottonseed oil. Since, in each case, the percentage of solid glycerides is increased sufficiently to make the final product semi-solid, and the percentage of linolin is decreased, the *process* by which this is done is immaterial. (Morrison, Re-D. Q. 124, Rec., p. 495.) Whether by the process of hydrogenation the converted hard fat is blended and mixed with the unconverted cottonseed liquid oil, or whether natural or hard hydrogenized animal or vegetable fat is blended and mixed with the liquid cottonseed oil, is of no consequence, for the patent in suit is for a product and not a process. (Wood Paper Patent, Case 90 U. S., 566; Cochrane v. Bodische, 111 U. S., 293.) So the argument of Respondent on this point fails.

In the last analysis, the patent is for a product, *i. e.*, a composition of matter ("my new lardlike *composition*," Burchenal patent, p. 1, line 67). This composition of matter consists of the old glycerides stearin, olein and linolin, in such proportion that the product is semi-solid at ordinary temperatures. The composition is edible, and is physically homogeneous. It contains a smaller percentage of linolin, different percentages of olein and stearin, than in the cottonseed oil which was used in making it.

It comprises linolin, which was originally in the cottonseed oil (which Respodent refers to as "rancidable material"), and olein and stearin, both of which were originally in the cottonseed oil. In each respect, as thus noted, the patented product is the same as the prior art products. Without confining the subject-

matter of claims 1 and 2 to the specific proportions of the old glycerides recited in the specification of the patent, which are not present in Petitioner's Kream Krisp, the Circuit Court of Appeals held that the patented product and the prior art products are the same thing and that the differences between them "are unimportant from the standpoint of chemist or cook."

Hence, we submit that the claims in suit for the semi-solid composition or food product, are clearly invalid in view of the prior art, and that to construe the claims as though they are for a particular process (namely, changing the chemical composition of cottonseed oil by an old process of partial or incomplete hydrogenation instead of by another old process), is an error of law.

In respect to the alleged immunity from rancidibility it may be noted that the patented product contains specifically 5% to 10% of the glyceride linolin which Respondent states is the "rancidable element of cottonseed oil." Kream Krisp and Jewel contain, respectively 37.7% and 41.5%. As to the tendency to rancidity, the evidence is that Kream Krisp and products like Jewel are substantially the same. (Re-D. Q. 365, Rec., p. 449). In each of the three cases there is a reduction or removal of linolin in the final product as compared with the cottonseed oil used in making it—contrary to Respondent's assertions. But, in the *degree* of difference Kream Krisp corresponds to the compounds of the prior art, and is not like the patented product.

It is asserted on page 10 of Respondent's Rejoinder that the Patent Office recognized Flake White and the patented product as distinct products. But, if the product of claims 1 and 2 in suit does not differ patentably from Flake White, the Patent Office clearly

erred in allowing claims 1 and 2. The reported decisions of the courts in patent cases show many such errors on the part of the Patent Office. After Flake White became known and was used, it became a part of the prior art as to anything invented thereafter, whether invented by Burchenal or any one else. General Electric Co. v. Sundh Electric Co., 251 Fed., 283, 285, is a case wherein the two patents were applied for simultaneously and issued simultaneously. The Court of Appeals held that the patent for the *subject-matter* invented latest in date was invalid for that said subject-matter contained no patentable improvement when compared with the subject-matter of the other patent, that was invented and produced first in date.

Finally, Flake White, which was produced and marketed prior to the invention of the patent in suit, was held by the District Court not to have been produced or invented by Burchenal. (Rec., pp. 762-764.) The Court of Appeals likewise found, we submit, that Burchenal did not invent Flake White (Rec., p. 777, first two paragraphs). Hence, Flake White, in this view of the case is surely prior art. This finding, we likewise submit, should not be disturbed, for where the lower court makes a finding of facts, then, so far as there is any testimony consistent with the finding, it should be treated as unassailable. Adamson v. Gilliland, 242 U. S., 350, 353. U. S. v. Fidelity Co., 236 U. S., 512, 527.

The other matters discussed in Respondent's Rejoinder, and not herein specifically treated, are disposed of in Petitioner's main brief and supplemental brief, except the allegation of Respondent that there must be some patentable difference betwen the patented product and the products of the prior art, be-

cause products produced in part from animal matter are inspected, whereas those produced from vegetable matter are not. This allegation is of no moment or significance. The fact is that *both products are inspected*, one under 34 Stat. L., 1260-5, and the other under the Food and Drugs Act, 34 Stat. L., 768-772 (X-Qs. 102-110, Rec., p. 354). Because these products are inspected under different statutes and by different officials, does not change the fact that the patented product and the prior art products, whether their origin is animal or vegetable, all consist of mixtures of the glycerides, olein, linolin and stearin, that these glycerides are respectively identical in *specie*, irrespective of their origin, and that the products are used indiscriminately.

Respectfully submitted,

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